

**SILVER KING**  
COMMUNICATIONS, INC.

ORIGINAL

May 17, 1995

VIA HAND DELIVERY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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Re: MM Docket No. 91-221  
Review of the Commission's  
Regulations Governing Television  
Broadcasting

MM Docket No. 87-8  
Television Satellite Stations  
Review of Policy and Rules

Dear Mr. Caton:

Transmitted herewith on behalf of Silver King Communications, Inc. are an original and four copies of its Comments in the above-referenced proceeding.

If there are any questions concerning this matter, please contact the undersigned.

Sincerely,



Michael Drayer  
Executive Vice President  
and General Counsel

Enclosures

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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Television Satellite Stations  
Review of Policy and Rules

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**COMMENTS OF SILVER KING COMMUNICATIONS, INC.**

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May 17, 1995

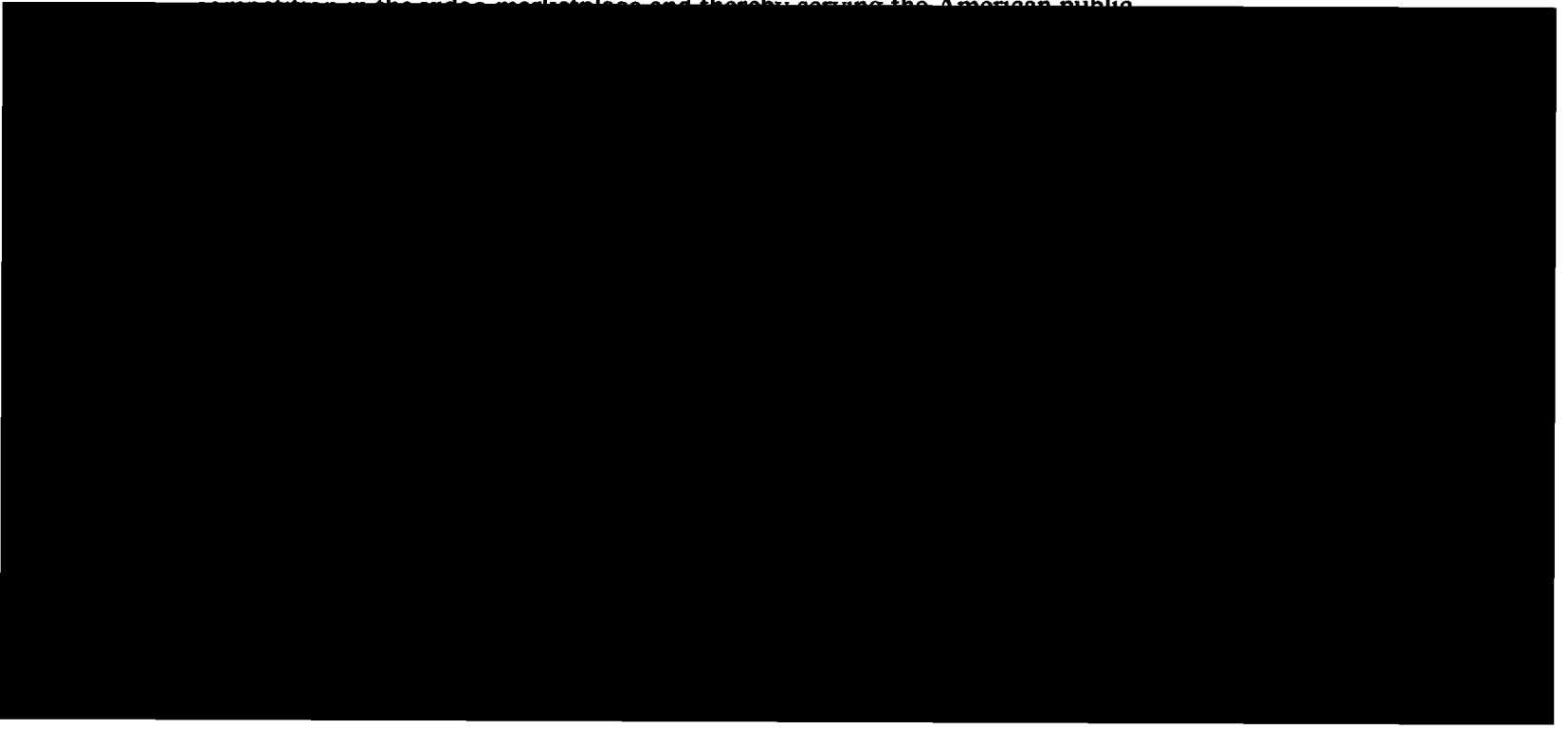
## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY .....	ii
INTRODUCTION .....	1
NATIONAL MULTIPLE OWNERSHIP LIMITATIONS .....	2
UHF DISCOUNT .....	9
FOSTERING MINORITY OWNERSHIP .....	12
TELEVISION SATELLITE STATIONS .....	13
TELEVISION DUOPOLY RULES .....	18
CONCLUSION .....	21

## SUMMARY

The Commission has presented a number of proposals to modify its broadcast television multiple ownership rules as a result of changes that have taken place in the video marketplace. Unfortunately, while the FCC recognizes that by now there is a well-established factual record supporting deregulation, it apparently remains committed to an incremental deregulatory approach.

While Silver King Communications, Inc. ("SKC") supports the general thrust of the Commission's findings, SKC does not support the agency's incremental approach to deregulation. Merely relaxing -- over time -- the anachronistic ownership cap and duopoly rules will increase the regulatory disadvantages already faced by television broadcasters. The Commission should follow its factual findings to their logical conclusion and repeal the national and local ownership restrictions. Short of that, however, those restrictions should be substantially relaxed and the UHF discount and television satellite exemption retained. As demonstrated herein, the Commission's television ownership rules no longer serve the Commission's public policy goals and, in fact, are contrary to the public interest and their abolition or substantial repeal will advance the agency's public interest objectives. The changes advocated by SKC are long overdue critical first steps in promoting fair competition in the video marketplace and thereby serving the American public.



**Before the  
FEDERAL COMMUNICATIONS, INC.  
Washington, D.C. 20554**

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	)	
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To: The Commission

**COMMENTS  
of  
SILVER KING COMMUNICATIONS, INC.**

Silver King Communications, Inc. ("SKC") hereby submits these Comments in response to the Commission's Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221 and 87-8 (released January 12, 1995) (hereinafter "FNPRM") concerning the Commission's television ownership rules and Local Marketing Agreements ("LMA's").

**INTRODUCTION**

SKC, through various subsidiaries, owns and operates 11 full-power, full-service, UHF television stations and one full-power, UHF television satellite station. These stations all currently broadcast Home Shopping Club programming. In addition, SKC's stations devote more airtime to local and public interest programming than most independent UHF television stations in their

markets.<sup>1</sup> Also, through various subsidiaries, SKC has lending and/or equity relationships with minority broadcasters who control six operating broadcast television stations with a seventh station under construction.

In its FNPRM, the Commission seeks comment on its television ownership rules and on LMA's. In its Comments, SKC will address several, but not all, aspects of the ownership rules and demonstrate that these rules should be substantially relaxed to enable television broadcasters to compete on a level playing field with their multichannel rivals in the increasingly competitive and dynamic communications industry.<sup>2</sup>

### **NATIONAL MULTIPLE OWNERSHIP LIMITATIONS**

The Commission proposes raising the national ownership limits based upon its findings that relaxing the current limits: (1) would have no adverse impact on the competitiveness of markets for delivered programming, the advertising market or the video program production market, (2) would not increase concentration of ownership within local markets, (3) would not implicate antitrust/competitive concerns, and (4) would have no serious adverse effects on diversity. FNPRM at 98-100. The Commission further notes that in 1984 it concluded "that national ownership limits

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<sup>1</sup> Home Shopping Station Issues, Report and Order in MM Docket No. 93-8, rel. July 19, 1993 at Para. 30. As Commissioner Quello wrote in his Separate Statement:

I will not repeat the discussion contained in the *Report and Order* regarding the extent to which home shopping stations devote time to traditional public service programs. But quite frankly, I was surprised at the extent to which this is true. In addition to the formal comments submitted for the record, the Commission was flooded with correspondence attesting to the community service provided by these stations.

<sup>2</sup> As the convergence of television, computers and telecommunications begins to take hold it is no longer appropriate to think in terms simply of competition within the traditional mass media industry.

could be phased out without harming competition or diversity at the national level” and accordingly adopted a 12 station limit with an automatic sunset provision abolishing all limits in six years. *Id.* at 100. However, on reconsideration, the Commission eliminated the automatic sunset fearing potentially disruptive restructuring of the broadcast industry. *Id.* The Commission is again proposing an incremental approach. *Id.*

SKC submits that continuing this phased approach is a mistake. It is now five years past the originally-proposed 1990 sunset date and the nature of the rulemaking process and its inherent delays has proven to be every bit as disrupting to the industry -- and more paralyzing -- than complete deregulation would have been. Simply put, the Commission’s own findings in 1984 and today support abolition of national ownership limits. Moreover, the Commission’s preeminent concern should be with the vitality of the industry -- preserving free over-the-air broadcasting in service to local communities -- not picking winners and losers, or attempting to protect parties within a competitive industry whether it be broadcast television or any other specific communications industry.<sup>3</sup> The government is simply not qualified for that role.<sup>4</sup>

The 1991 FCC Office of Plans and Policy Staff Working Paper entitled “Broadcast Television

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<sup>3</sup> This, of course, differs from attempting to remove structural barriers to enter the industry as proposed in the Commission’s Minority Ownership rulemaking.

<sup>4</sup> Chairman Reed Hundt made this same observation at the National Association of Broadcasters convention in the context of broadcasters’ use of a second channel:

There has to be the possibility to deliver full HDTV over the air, but I am wary of the wisdom of the government mandating how you should take advantage of the business opportunities that the digital revolution creates. I suspect you know better than government what to send.

Broadcasting & Cable, “Hundt proposes 2nd-channel freedom,” April 17, 1995 at 8.

in a Multichannel Marketplace”<sup>5</sup> examined the then-current state of the video marketplace and likely video landscape at the close of the century based upon an analysis of then-current trends. The OPP Paper documented what has become apparent to virtually all observers of the video marketplace, that television broadcasters were struggling while multichannel video providers were prospering in a video industry characterized by outmoded regulations that are predicated on a video marketplace dominated by television broadcasters that no longer exists. While broadcasters have met with substantial success in the past year and many cable system operators have struggled during the implementation stage of the Cable Television Consumer Protection and Competition Act of 1992 (the “Cable Act”) and the FCC’s rules and regulations promulgated thereunder, no one disputes that the video landscape remains essentially unchanged for television broadcasters except that the pace of multichannel provider competition is rapidly increasing with the growth of wireless cable, the advent of operating Direct Broadcast Satellite (“DBS”) systems, and telephone company (“telco(s)”) tests and planned video dialtone and cable systems.

It is beyond dispute that there is a compelling national interest in preserving our nation’s broadcast television system which, free of charge, provides to all Americans television programming responsive to the needs of their local communities, and which demands that as public trustees local broadcasters provide these communities vital local service through informational programming and emergency broadcasts. It has long been recognized that American television provides an important shared national experience to a society characterized by diversity and, at times, fragmentation -- an

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<sup>5</sup> Office of Plans and Policy Working Paper #26. Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd. 3996 (1991) (hereinafter “OPP Paper”).

experience that cannot remain truly common to all Americans absent free television.<sup>6</sup>

The Commission has recognized that as the expert agency concerning communications matters, it is obligated to ensure periodically that its rules and policies comport with marketplace realities. It is equally true, as the Commission has noted, that its rules are not designed to serve only to correct market imperfections, but also to promote public interest objectives. The agency's preeminent objective in this proceeding is, of course, to preserve the American broadcasting system because of that system's unique contribution to, and role in, American life and in promoting and facilitating First Amendment rights. SKC believes that the Commission should conclude that for free over-the-air television to have a fair opportunity to compete and continue to serve the American public in the fashion to which Americans have become accustomed, the Commission should repeal its national ownership cap with respect to broadcast television stations. These rules are anachronisms that threaten the long-term future of a robust television industry in a video marketplace increasingly dominated by cable operators, wireless cable, DBS and telcos, and their repeal will be a critical first step in promoting fair competition in the video marketplace without compromising the FCC's public policy goals.

The OPP Paper provided strong evidence of, if not a dark, an increasingly cloudy future for the broadcast television industry based upon the 1991 video landscape, then-current trends and the inherent advantages enjoyed by multichannel video providers subject to less regulation than their

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<sup>6</sup> The tragic bombing of a federal building in Oklahoma City on April 19, 1995 is another illustration [albeit an unfortunate one] of the vital role free broadcast television plays in creating a sense of national identity and community in our diverse society. See, e.g., Broadcasting & Cable, "Radio, TV mobilize in Oklahoma City," April 24, 1995 at 10, 14.

broadcast competitors.<sup>7</sup>

Based upon the evidence adduced by its thorough study, the Office of Plans and Policy reached the following conclusions:

The broadcast television industry has suffered an irreversible long-term decline in audience and revenue shares, which will continue through the current decade ... Broadcast television stations will experience declining revenues and increasing program costs. Network compensation will fall with network advertising revenues, and national spot advertising will erode partially to cable. The potential for greatly increased competition from cable in local advertising is clear as well.<sup>8</sup>

[C]able subscribers' viewing will shift increasingly to cable-originated channels... As cable advertising becomes a better substitute for network advertising, prices of network advertising will fall, and advertising revenue will fall along with audiences...<sup>9</sup> Viewers will increasingly see cable and broadcast programming as interchangeable... Other nationwide distribution media may develop through some combination of cable and DBS. The networks will continue to lose their uniqueness to both audiences and advertisers, leaving them increasingly three program packagers among a large number.<sup>10</sup>

Television broadcasters, and the networks that supply them, will clearly decline in relative importance and probably in number and size as well over the next decade. The power of the networks that the Commission has historically sought to curb has succumbed to technology and competition. Broadcast television, however, will remain a **reasonably** prominent feature of the American landscape.<sup>11</sup>

The Commission's paramount concern must be with the public interest, i.e., the viewer.<sup>12</sup> To

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<sup>7</sup> SKC recognizes, of course, that cable has become subject to significant regulation under the Cable Act, while Congress currently is considering providing that industry some relief through telecommunications reform legislation.

<sup>8</sup> OPP Paper at 159.

<sup>9</sup> Id. at 162.

<sup>10</sup> Id. at 163.

<sup>11</sup> Id. at 159 (emphasis added).

<sup>12</sup> See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

the average viewer television is what appears on the screen. Unlike wired cable, wireless cable and DBS, however, broadcasting is not merely a delivery medium for what appears on a viewer's television screen. Television broadcasters alone have been obligated to provide public service to their communities, the importance of which only would become fully evident to viewers if broadcast channels began to disappear from the video marketplace.

The OPP Paper demonstrated that terrestrial broadcasters, as users of a single-channel delivery medium, would be challenged by competition from multichannel providers and other video service providers who charge for their services even if a level regulatory playing field were in place. Unfortunately, broadcasters currently must compete on an uneven playing field as well. An important first step towards leveling that field would be for the Commission to repeal its national ownership limits.

There is no question that the multiple ownership rules economically disadvantage broadcasters. It also is clear that the repeal of the national ownership cap will not turn television broadcasters into competitive multichannel providers in local markets; but it will provide them with a fairer opportunity to compete on an equal footing. Television broadcasters' ultimate success in the video marketplace will continue to be predicted on their unique qualities -- their local responsiveness, identity and innovations -- as it should be. As public trustees broadcasters are different, and even with repeal of the multiple ownership rules, they are likely to compete effectively in the video marketplace against cable systems and other multichannel providers only by accentuating these differences.

Specifically, the multiple ownership rules prevent television broadcasters from fully realizing economies of scale both locally and nationally. The Office of Plans and Policy recognized this truth

and concluded:

In today's market, for instance, common ownership of larger numbers of broadcast stations nationwide, or of more than one station in a market, may permit exploitation of economies of scale and reduce costs or permit improved service. Joint newsgathering operations, for instance, might permit improvements in the quality of local news coverage. For these reasons, the Commission should eliminate its broadcast multiple ownership rules, relax the duopoly rules to permit common ownership of television stations unless their grade A contours overlap, and consider eliminating the duopoly rules for unaffiliated UHF stations.<sup>13</sup>

SKC supports the Office of Plans and Policy's recommendation that the Commission repeal the national ownership limits.

The availability of these economies of scale resulting from modification of the multiple ownership rules would allow broadcasters to improve the quality of local news coverage and other public interest programming (e.g., increasing the quantity and quality of children's programming -- a public policy goal currently of great interest to the Commission) thereby benefitting broadcasters through cost savings that permit them to distinguish themselves in their markets, while benefitting the public that would be the recipient of stations' improved service to their local communities.

Eliminating the national ownership limits could, in fact, also prove beneficial to small entrepreneurs and prospective minority station owners. As detailed in its Comments in the Commission's Minority Ownership rulemaking proceeding, SKC has played a leading role among companies in encouraging increased minority ownership of television stations through financing, operational assistance and equity investments with existing and prospective minority station owners. SKC's efforts reflect the company's belief that these undertakings are sound business investments as well as being the right thing to do. However, clearly SKC and others could do more to assist minorities and other new television industry entrants if they were not foreclosed from obtaining more

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<sup>13</sup> OPP Paper at 170.

security for providing this assistance in the form of attributable minority ownership interests or options to obtain such interests that could be exercised without regard to the company's current number of attributable interests.

Technology and competition have eroded both the marketplace and public policy justifications for maintaining the television national multiple ownership rules in their current form. Concerns over the concentration of ownership on the national level can no longer be taken seriously. Cable television system operators offer dozens of channels in individual markets and are constrained in multiple system ownership only by the antitrust laws.<sup>14</sup> In practice this means they have not been constrained at all. Repealing the national ownership cap will make the video regulatory landscape just a bit fairer and thereby promote a stronger, free over-the-air broadcast television industry that will place broadcasters in a position to improve their service to our nation's local communities and, given the crowded video marketplace, will provide them with the incentives to do so.

### **UHF DISCOUNT**

The Commission seeks comment on its current practice of attributing UHF television stations with only 50% of their theoretical reach within their Areas of Dominant Influence. FNPRM at 102. SKC, a group owner of 12 UHF stations (including one television satellite station), supports retention of the discount, but, in the alternative, supports permanent "grandfathering" existing discounted stations.

The Commission correctly notes that there have been improvements in UHF signal propagation. Id. However, a more than de minimis disparity between UHF and VHF technology

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<sup>14</sup> While the Commission has adopted rules limiting the permissible national reach of cable systems attributable to operators, these rules have been stayed by the courts.

remains. Achieving the equivalent signal strength and quality of an in-market VHF station remains costlier for a UHF station and still cannot always be achieved.

While in Tampa, Florida a five megawatt UHF station has materially the same coverage as 100,000 watt VHF station, in Phoenix, Arizona it would be costly to power up a UHF station to approach the reach of a VHF station and even then the VHF station would retain a reach advantage.<sup>15</sup> In the Phoenix market, according to Charles Allen, General Manager of Station KAET(TV), Channel 8, a \$900,000 investment in a new transmitter would be required to make the signal of Station KNXV-TV, Channel 15 competitive and this change would increase the station's power bills from \$60,000 to \$300,000 per year.<sup>16</sup> Moreover, despite this initial \$900,000 investment and the recurring \$240,000 annual power bill increase, KNXV-TV still would not reach as many viewers as KAET(TV).<sup>17</sup> Likewise, Randall Feldman, President of WYES-TV, Channel 12, New Orleans, Louisiana, says that no UHF station is equal to a VHF station in strength and in a swap with WGNO(TV), Channel 26, WYES-TV would lose some reach and its expenses would increase.<sup>18</sup> According to Broadcasting & Cable, one CBS spokesman referred to the network's new Atlanta, Georgia affiliate, WGNX(TV), Channel 46, as "a large megaphone on top of a hill."<sup>19</sup>

Thus, notwithstanding improvements in "UHF technology," a technology gap remains because even in the best case scenario, a UHF station can only compete with the reach and signal quality of

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<sup>15</sup> Broadcasting & Cable, "Public TV solution not as simple as V's, U's," April 3, 1995 at 80.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id. at 79.

<sup>19</sup> Id.

a VHF station at substantially greater expense. More importantly, however, the competitive disparity -- while diminishing somewhat -- remains substantial between VHF and UHF television stations. These disparities, whether resulting from technical differences, ingrained viewing habits, marketing perceptions and/or other factors, are reflected by marketplace realities in the form of, inter alia, appraisals and other marketplace valuations (e.g., VHF and UHF comparable sales prices). The impact of New World Communications' affiliation switches at most of its 12 television stations from CBS to Fox, which ultimately resulted in 68 stations in 33 markets swapping affiliations,<sup>20</sup> was recognized industry-wide as particularly significant because Fox gained the "advantage" of moving its programming from many of its UHF affiliates to VHF affiliates, while the Big Three (i.e., ABC, NBC and CBS) scrambled to avoid, in many cases without success, being relegated to UHF stations. As recently noted in Broadcasting & Cable, "The TV network affiliate switches this season helped Fox beat one of the Big Three, CBS, for the first time in viewership among adults 18-49, a highly coveted advertiser demographic."<sup>21</sup> Thus it is clearly recognized that, while the 50% UHF discount is not scientifically based, the need, support and public policy rationale for retaining a UHF discount remains.

The Commission also notes that in addition to improvements in UHF signal propagation, "extensive cable carriage of UHF signals may have reduced the signal-quality disparity with VHF signals." FNPRM at 102. Although, the Commission goes on to note, the approximately 5% of potential viewers not reached by cable and 37.5% of television households which do not subscribe to cable remain dependent on over-the-air reception of VHF/UHF signals. Id.

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<sup>20</sup> Broadcasting & Cable, "Perelman didn't mean to start a revolution," April 17, 1995 at 49.

<sup>21</sup> Broadcasting & Cable, "The mixed bag of affiliate switches," April 24, 1995 at 15.

SKC maintains that the growth in cable penetration makes the case for maintaining the UHF discount more compelling. While carriage of UHF stations on cable systems goes a long way towards not only reducing the remaining VHF/UHF signal-quality disparity problem, but the other equally-important differences that disadvantage stations when all local broadcast stations are located on the same tier, the absence of carriage of UHF stations makes even the 50% discount clearly inadequate. The record compiled by Congress and broadcasters in Congress and at the FCC over the years with respect to must carry makes abundantly clear that it is UHF broadcasters -- not VHF broadcasters -- who are at risk of being denied cable carriage in the absence of must carry. As the Commission is well aware, legal challenges to the constitutionality of must carry are pending at the United States District Court for the District of Columbia and, regardless of the outcome of the Court's decision on remand, the nonprevailing parties will likely appeal that decision to the United States Supreme Court for a second time. Accordingly, there is no assurance that must carry will remain in force and those UHF stations that have gained carriage solely through the force of law will be able to retain that carriage beyond the near future. Given the uncertain status of must carry, it is thus premature to consider eliminating the UHF discount because in the absence of must carry UHF broadcasters may end up more, not less, disadvantaged by the extensive cable-wiring of America.<sup>22</sup>

### **FOSTERING MINORITY OWNERSHIP**

The Commission seeks comment on its concern that relaxation of its national ownership limits

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<sup>22</sup> If the Commission eliminates the UHF discount, SKC supports grandfathering discounted status for current owners of UHF stations because, although the Commission has stated forced divestiture will not be required, substantial and inequitable business disruption and marketplace distortion will result from the impact on business expansion and other plans from a failure to grant grandfather status. In other words, the negative and inequitable impact of denying grandfathering, while not quite as great as forced divestiture, may come close because a company's inability to grow can prove fatal in an environment as competitive as communications.

may increase the number of potential bidders for station acquisitions thereby driving up prices and making it more difficult for minorities and women to acquire stations. FNPRM at 94. At the same time, the Commission requests comment on how the national multiple ownership rules can be structured to enhance minority ownership. Id. at 103.

As the Commission correctly notes “it is not the price per se that is the problem, but minorities’ ability to finance the purchase of a higher priced station.” Id. at 94. SKC agrees. As demonstrated previously herein, the Commission’s national multiple ownership rules must be relaxed to enable broadcasters to compete in the multichannel world of the future that is already taking shape. Therefore, minority ownership must be fostered in an environment that does not work at cross-purposes with the preeminent goal of creating a regulatory environment in which free over-the-air broadcasting remains a vital industry. For this reason, the Commission’s concern with potential changes in the television acquisition marketplace created by relaxation of the national ownership limits is misplaced. The way in which the Commission can do most to increase minority and female ownership without compromising its other objectives in this FNPRM and its Minority Ownership and Attribution rulemaking proceedings is to abolish the national ownership cap and adopt SKC’s minority incubation program proposals and SKC’s minority/nonminority attribution proposals in the Commission’s Minority Ownership proceeding.

### **TELEVISION SATELLITE STATIONS**

The Commission seeks comment as to whether television satellite stations should continue to be exempted from the national multiple ownership rules. Id. at 104.

SKC is the owner and operator, through one of its subsidiaries, of Station WHSI-TV, Smithtown, New York. WHSI-TV is a satellite of Station WHSE-TV, Newark, New Jersey, which

is owned and operated by SKC through the same subsidiary.

SKC's former parent, Home Shopping Network, Inc. ("HSN"), previously filed comments in the Commission's Second Further Notice of Proposed Rulemaking, MM Docket No. 87-8 (released August 21, 1991) (hereinafter "Second NPRM") supporting retention of the exemption of television satellite stations from the Commission's national multiple ownership rules. The continuing barriers to minority, female and small business ownership of television stations, and the Commission's express desire to foster increased minority and female ownership of mass media facilities make the case for retaining this exemption even more compelling today than it was in 1991.

As the Commission previously recognized in this docket, the fundamental reason for continuing to exempt television satellite stations from the multiple ownership rules is that satellite operation results in the provision of television service to areas which otherwise would be unserved or more severely underserved. At the same time, the 1991 abolition of the 5% local origination limit allows the satellite to better serve its market and, as an added bonus, increase the amount of program diversity in that portion of the satellite's service area that also is served by the parent station. Through the strict enforcement of the 1991 standards, particularly the requirement that satellite status be granted only where no other party is ready and able to construct or purchase and operate a full-service station, the Commission can ensure that satellites will continue to serve the public interest where no other alternative exists.<sup>23</sup>

In the past, theoretical concern has been expressed that the Commission's failure to adopt an ownership cap on satellites could result in the creation of television satellite station networks. This

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<sup>23</sup> SKC recognizes, of course, that the presumption established by the new standards favoring grant of satellite proposals is rebuttable, and, in other cases, an applicant that does not satisfy the standards can still demonstrate its entitlement to satellite status.

concern ignores the economic disincentives of operating any station in a market where only satellite operation appears to be potentially viable due to economies of scale. Thus there is no reason to expect that any broadcasters will flock to markets to operate financially marginal satellite stations. Traditionally, satellite applicants have sought to provide service to a specific area because a unique set of circumstances justified what otherwise would have been an economically dubious venture. Group owners could have pursued multiple satellite authorizations more easily under the standards adopted by the Commission in 1991 which replaced the prior ad-hoc approach, yet, SKC is unaware of any such effort ever having been undertaken either before or after 1991. On the other hand, there is no public interest benefit in potentially denying television satellite service or eliminating existing service by counting satellite stations under the multiple ownership rules.

The only potential competing consideration identified for comment by the Commission in the Second NPRM was whether continuing to exempt satellite stations from the national ownership cap on full-power television stations would limit opportunities for small entrepreneurs or new industry entrants. There is simply no evidence that this theoretical possibility would occur.<sup>24</sup> The marginal nature of these stations makes it desirable policy for the Commission to enlarge rather than restrict the pool of potential satellite station applicants or owners.<sup>25</sup>

In a pending Petition for Reconsideration of the Commission's 1991 Report and Order, Media

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<sup>24</sup> It also should be noted that a parent station and satellite station do not have to be commonly owned.

<sup>25</sup> There is some question as to whether small entrepreneurs or new industry entrants should be pushed into operating such economically disadvantaged stations in the first place. In any event, however, retaining the exemption would permit station group owners to provide financial support to, and maintain attributable and non-attributable minority ownership interests in, satellite stations controlled by small entrepreneurs and new industry entrants, thereby providing a potential means for assisting them into entering television broadcasting.

Access Project ("MAP") asked, inter alia, that the agency rule that if an otherwise-qualified applicant proposes to operate a full-service station in filing a competing application against the renewal application of a satellite station, the competing applicant be declared the winner outright or the renewal applicant be denied the opportunity to demonstrate its entitlement to a renewal expectancy. As HSN stated with respect to the Second NPRM, SKC believes this docket is a proper forum to address these two misguided aspects of MAP's Petition.

It is both naive and contrary to the public interest to take away the license of an operating television station at renewal time based upon no more than a competitor's claim that it will not operate the station as a satellite. In the first place, the public interest clearly would not be furthered by shutting down an operating station without any assurance that the newcomer will build and operate its proposed station if authorized. Many permittees encounter significant difficulties in obtaining financing following grant (and, as detailed in SKC's Comments in the Commission's companion rulemakings on minority ownership and attribution, some of them have turned to SKC for assistance) and for this reason it cannot be assumed that authorization of a construction permit will result in implementation of service.

MAP expressed concern that purported "full-service" applicants will be deterred from applying if they must face the cost of a comparative hearing. This raises the obvious and fundamental question about the seriousness of an applicant that claims it will operate a full-service station in a difficult market that has previously proven incapable of supporting a standalone station, when that applicant is unwilling to make more than a token investment to take away the license of a television satellite station owner. MAP's concern should more appropriately be with the satellite licensee's investment, and quite possible its significant losses, in operating its station over the years and

providing television service to the public that otherwise would not be available.

MAP's fallback argument that a satellite licensee should not be allowed to seek a renewal expectancy is likewise misguided. It ignores the Commission's longstanding and proper reliance on station performance as a predictive measure of a licensee's future performance far superior to the "paper" promises of a competing applicant in a license renewal proceeding. An even more basic problem with MAP's position is that it cuts directly against the Commission's stated desire in the 1991 Report and Order of encouraging local origination by satellite licensees through the agency's elimination of the 5% local origination limit. Local service is the cornerstone of the public interest standard and of primary concern to the Commission in acting upon license renewal applications of full-service broadcast stations. It makes no sense as a matter of law or policy for the Commission to deny the possibility of a renewal expectancy to an applicant that provides local programming at the Commission's urging, even though the applicant's satellite status does not require it to do so.<sup>26</sup>

In the event that the Commission decides to apply the national ownership cap to satellite stations, it should grandfather those stations granted satellite status prior to abolition of the exemption (i.e., the stations should continue to not be counted towards the ownership cap so long as they remain under combined ownership). Equity and common sense dictate this result. As to fairness, satellite station owners that have applied for satellites or purchased satellite stations have made long-term plans based upon the exemption. Many station owners have invested substantial amounts of money in these stations and in the process furthered the public interest by serving

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<sup>26</sup> The license renewal setting is a very different one from the setting involving applicants for a new station where, on equal footing, one or more applicants propose to operate a full-service station and one or more applicants propose to operate a satellite station. Therefore, there is no rational basis for treating such competing applicants in the manner in which television satellite renewal applicants are treated.

previously unserved or underserved markets and/or by increasing service diversity. As a matter of policy, it simply would not make sense to force the divestiture of stations that might lead not only to a decrease in quality of service, but in stations going dark. It is very unlikely, particularly in uncertain economic times and given the permanently changed landscape of the video industry, that satellite stations would be purchased separately in the event of forced divestiture.

Strict enforcement of the Commission's satellite criteria will ensure that satellite authority will be granted only in cases where there is virtually no chance that full-power television service will otherwise be provided. Moreover, maintaining the satellite station exemption from the national ownership cap not only increases the opportunities for the provision of this service, it provides no barrier to new entrants and may, in fact, lower the greatest barrier of all: the financial one. It is that barrier that the Commission is once again attempting to break down to increase minority and female ownership in the broadcast industry. It is thus crucial that the impact of the Commission's decisions in its Television Ownership, Minority Ownership and Attribution rulemaking proceedings are considered together to avoid results at cross-purposes with one another.

### **TELEVISION DUOPOLY RULES**

The Commission proposes to relax its television duopoly rules to permit common ownership of broadcast television stations with overlapping Grade B contours, while retaining the prohibition with respect to Grade A contour overlaps. FNPRM at 116. The Commission also seeks comment on possible exceptions to its duopoly prohibitions, such as television UHF/UHF combinations and VHF/UHF combinations, and whether in lieu of such changes, certain combinations should be considered on a waiver request basis either under presumptive guidelines or on a case-by-case basis. Id. at 118. The Commission also believes that under any approach it considers the agency should

take into account the number of independent suppliers serving the market. Id. at 121.

As detailed herein with respect to discussion of the Commission's national ownership limits, the Commission and, in particular, its Office of Plans and Policy have recognized that structural changes in the video industry and the inherent advantages enjoyed by multichannel video providers subject to less regulation than their broadcast competitors necessitate a leveling of the playing field if broadcasters are to have a fair and reasonable opportunity to compete in the near future and ensure the availability of free over-the-air television serving our nation's local communities.<sup>27</sup> Moreover, as noted previously, in 1991, the Office of Plans and Policy concluded:

In today's market, for instance, common ownership of larger numbers of broadcast stations nationwide, or of more than one station in a market, may permit exploitation of economies of scale and reduce costs or permit improved service. Joint newsgathering operations, for instance, might permit improvements in the quality of local news coverage. For these reasons, the Commission should eliminate its broadcast multiple ownership rules, relax the duopoly rules to permit common ownership of television stations unless their grade A contours overlap, and consider eliminating the duopoly rules for unaffiliated UHF stations.<sup>28</sup>

The Commission has stated that the duopoly rules prevent television broadcasters from fully realizing beneficial economies of scale -- efficiencies that may in fact be greater than those implicated by the national ownership cap. The Commission also has noted that the level of competition in local markets has greatly increased since the duopoly rules were adopted in 1964. Accordingly, the Commission offers proposals that would relax the duopoly rules as applied to television stations.

Beginning as early as 1991, through the release of the OPP Paper, the subsequent Commission

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<sup>27</sup> SKC Comments at 3-6.

<sup>28</sup> OPP Paper at 170.

Notices of Inquiry and Proposed Rulemaking, and the current Further Notice of Proposed Rulemaking, the FCC has concluded that television broadcasters face competition from other video providers on both a national and local basis. Moreover, this competition is greatest in local markets where multichannel providers subject to less regulation than broadcasters are providing head-to-head competition. Furthermore, since 1991, the field has increased with DBS systems up and running, telco entry imminent and the maturation of the wireless cable industry.<sup>29</sup>

Given this now almost half-decade long record supporting complete deregulation there is only one intellectually honest conclusion: the Commission should repeal its duopoly rules (at least within the top 50 markets) as well as its national ownership restrictions. The incremental deregulation approach is simply inconsistent with the record evidence already before the Commission. Cable television is today broadcast television's primary competitor for viewers. As with cable television, the antitrust laws should govern restrictions on local ownership and enforcement should be left to the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). The Commission's own analysis in the FNPRM employs antitrust principles and methodologies. Thus it is the agencies that are charged with antitrust enforcement -- DOJ and the FTC, not the Commission -- that should ensure that broadcasters do not amass inappropriate market power as DOJ and the FTC do when antitrust/competition issues are raised with respect to "clustering" by cable television system operators. Only then will there be a level playing field among video service providers.

Local broadcasters have a legal obligation and a commitment to their local communities, and provide free universal service, which makes them unique among our nation's video providers. It

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<sup>29</sup> See Broadcasting & Cable, "After 22 Years, An Overnight Sensation, MMDS A.K.A. WIRELESS CABLE," May 1, 1995 at 16-23 (cover story).

defies common sense to handicap them with anachronistic rules and regulations that do not allow them a fair opportunity to compete and make it more difficult to fulfill their unique obligations and commitment. Accordingly, the duopoly rules should be repealed.

If the Commission does not abolish the duopoly rules, SKC supports elimination of the duopoly rules as applied to VHF/UHF combinations or UHF/UHF combinations. Short of that, the duopoly rules should not apply to unaffiliated UHF stations.<sup>30</sup> Besides being inherently handicapped by their "channel position," ingrained viewing habits and marketing perception, and facing the same economic obstacles faced by all television broadcasters, UHF licensees also must overcome additional barriers to succeed because their stations typically have less favorable signal propagation characteristics and higher technical operating costs than VHF stations. Co-ownership of UHF stations in the same market, when such stations under the best of circumstances must "try harder" to survive, presents no threat to diversity that is not substantially outweighed by the benefits of continued operation and improved services that can result from the efficiencies created by co-ownership.<sup>31</sup>

### **CONCLUSION**

In an interview with Broadcasting & Cable during the first week of April, Chairman Reed Hundt stated the following:

I want broadcasters to be able to compete against cable, DBS, MMDS [wireless cable], video dialtone, VCR's, theatrical exhibition and all other forms of video distribution. If we let the whole world go digital except broadcasters and give them

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<sup>30</sup> SKC proposes that for purposes of identifying unaffiliated UHF stations the definition of a television network set out in Section 73.662(f) of the Commission's rules be applied.

<sup>31</sup> In addition, to the extent the Commission retains its duopoly rules, their enforcement also should be limited to the common ownership of television stations with Grade A contour overlaps.